

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID LEE HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUL 8 1968

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On September 7, 1967 a one count indictment was returned by the Grand Jury for the Central District of California [C. T. 2]. ^{1/} The indictment charged that on or about July 6, 1967 the appellant Hill and co-defendant Williams by force, violence, and intimidation took from teller Russell Kerger, \$2,278, belonging to the United States National Bank, Windsor Hills Branch, 4437 West Slauson, Los Angeles, California in violation of Title 18,

^{1/} C. T. refers to Clerk's Transcript of Record.

United States Code, Section 2113(a). Further, that in committing the offense appellant Hill and co-defendant Williams assaulted and put in jeopardy the life of Russell Kerger by the use of a pistol and sawed-off shotgun in violation of Title 18, United States Code, Section 2113(d) [C. T. 2].

On September 11, 1967 appellant Hill appeared with counsel and pled not guilty [C. T. 4].

On September 18, 1967 the case was set for a jury trial on October 17, 1967 [C. T. 8].

The jury was impaneled on October 17, 1967 [C. T. 14]. Trial was held from October 17 through October 19, 1967 [C. T. 14-16].

On October 20, 1967 the appellant Hill and co-defendant Williams were found guilty as charged [C. T. 17-19].

On December 4, 1967 appellant Hill was sentenced to the custody of the Attorney General for 15 years under the provisions of Title 18, United States Code, Section 4208(a)(2) [C. T. 24-25].

Appellant Hill filed a timely notice of appeal on December 7, 1967 [C. T. 28]. The District Court issued an order permitting appeal in forma pauperis on December 7, 1967 [C. T. 29].

The offense occurred in the Central District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 2113(a)(d), Title 18, United States Code, Section 3231, and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to entertain this appeal pursuant to Title 28, United States Code, Sections 1291 and 1294

and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

The indictment was brought under Title 18, United States Code, Sections 2113(a) and (d) which provides in pertinent part as follows:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

"

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) . . . of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."

III

STATEMENT OF FACTS

On July 6, 1967, the United States National Bank, Windsor Hills Branch, was robbed of \$2,278 [R. T. 68, 90, 143-144]. ^{2/} The Bank was on July 6, 1967 a national bank, a member of the Federal Reserve System, and a bank whose deposits were insured by the Federal Deposit Insurance Corporation [R. T. 66].

Laura Thomas and Russell Kerger were tellers at the United States National Bank in July of 1967 [R. T. 67, 90]. Richard Bombard was Operations Officer at the Bank during that period of time [R. T. 143].

At five minutes before 3:00 o'clock on July 6, 1967, Laura Thomas, teller at window number two, observed a male Negro enter the bank through the rear door [R. T. 91-92]. This male Negro was identified in the courtroom as appellant Hill [R. T. 73, 97, 149].

Appellant walked across the lobby and stood in line behind teller window number one. He waved a small blue steel revolver and directed every one to sit down in a chair [R. T. 69, 92]. Thomas turned to Richard Bombard and told him to sit down. Bombard was already seated approximately six feet to the rear of the tellers' cages [R. T. 144-146]. Thomas sat in a chair behind the tellers' windows [R. T. 92].

^{2/} R. T. refers to Reporter's Transcript of Proceedings.

A second male Negro was standing toward the rear of the bank. He was holding a sawed-off shotgun [R. T. 71, 92, 93, 144]. This man was later identified in the courtroom as co-defendant Williams [R. T. 97-98, 149-150]. Williams ordered everyone to lay down on the floor [R. T. 92]. Appellant repeated the command for everyone to lay on the floor [R. T. 69, 92]. Thomas laid down on the floor [R. T. 93]. Bombard crouched at the side of his desk and observed both the appellant and co-defendant Williams during the course of the robbery [R. T. 146-147].

Russell Kerger, who was working at teller window number one, was starting to lay down when appellant ordered that he come over to teller window number four [R. T. 69]. Kerger walked over to the counter where appellant threw him a brown paper bag and ordered that he fill it with currency [R. T. 69]. Kerger opened the cash drawer at window number four but as it was not in use the drawer was empty. Appellant looked in the drawer and stated: "You knew that drawer was empty, didn't you?" [R. T. 70: lines 6-8; 144-145. Kerger, followed by appellant, proceeded to window number three. Kerger attempted to open the drawer but it was locked. Appellant said: "You knew that cash drawer was locked, didn't you? You know where it is. Let's get it." He waved the pistol at Kerger [R. T. 70, lines 14-17]. Kerger then went to windows number one and two where he obtained \$2,278 in currency [R. T. 70: 151, line 8]. He placed the money in the paper bag. Appellant grabbed the bag from his hand and ordered him to lay on the floor [R. T. 70]. Appellant and co-defendant

Williams fled through the rear door of the bank [R. T. 145].

The appellant presented the defense of alibi. He testified that he and co-defendant Williams were very close friends [R. T. 251, lines 20-21]. Further, that on July 6, 1967, he was with Williams for most of the day. He recalled that at approximately 12:30 Williams and his wife Mary Ann came by his house in a taxicab. He got into the taxi and they proceeded to Williams' mother's house. They stayed at the house watching the television program "The Fugitive" until 2:00. At 2:00 Williams, appellant, and Johnny Lee Williams, co-defendant Williams' brother, left the house to go inquire about Williams' automobile which had been wrecked and was sitting in a gas station at Vernon and San Pedro [R. T. 205, 257]. The three rode the bus to the corner of Vernon and Central where they hitched a ride to the home of William Love. William Love is co-defendant Williams' cousin [R. T. 243]. Love took appellant, Williams, and Johnny Lee Williams to see the car at Vernon and San Pedro. They waited while the car was towed away and returned home at approximately 6:00 to 7:00 [R. T. 240-260]. The story was corroborated by co-defendant Williams [R. T. 199-208]; Mary Ann Williams, the wife of co-defendant Williams [R. T. 219-222]; Bessie Williams, the mother of co-defendant Williams [R. T. 225-229]; Johnny Lee Williams, the brother of co-defendant Williams [R. T. 235-240]; and William Love, the cousin of co-defendant Williams [R. T. 243-248]. The appellant also called Larry Junious and Robert Crawford. In July of 1967 both men worked in the gas station at the corner of

San Pedro and Vernon [R. T. 281, 292-293]. They both recalled a damaged vehicle left in the gas station parking lot [R. T. 282, 293]. Crawford could not recall when the car was at the station or the day it was removed [R. T. 293, lines 18-24]. He did recall that the car was removed on an afternoon between 3:30 to 6:00 [R. T. 295, lines 12-14]. Junious was not positive of the day the car was towed away. He thought it might have been July 6th but could not be sure [R. T. 283, lines 8-16; 290-291]. He recalled that the car was towed away on an afternoon sometime between 3:00 and 6:00 [R. T. 288, lines 12-20].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal. 3/

1. The District Court erred in failing to order the United States Attorney to produce all statements, signed or unsigned, made by witness Thomas.

2. The District Court erred in failing to strike the identification testimony of all witnesses who were shown pictures of the appellant where in pictures used were so suggestive as to constitute a violation of due process of law.

3/ Appellant's Opening Brief, page 16.

ARGUMENT

A. FAILURE TO MOVE FOR PRODUCTION OF JENCKS ACT STATEMENTS IN THE DISTRICT COURT PRECLUDES CONSIDERATION OF NON-DISCLOSURE ON APPEAL.

Title 18, United States Code, Section 3500 provides in pertinent part that "after a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in possession of the United States which relates to the subject matter to which the witness testified." (emphasis added).

The appellee called three witnesses [R. T. 67, 88, 143]. Each of the witnesses was cross-examined by the attorney for appellant [R. T. 73-83; 100-110; 151-173]. The appellant made no motion for production of witnesses' statements under Title 18, United States Code, Section 3500.

The burden was on appellant to invoke the Jencks Act at the proper time and in the proper manner so that the trial court would have an opportunity to rule on his request. The failure of the appellant to raise this issue in the District Court prevents him from arguing non-disclosure on appeal.

Lewis v. United States, 340 F.2d 678
(8th Cir. 1965);

Ogden v. United States, 303 F.2d 724

(9th Cir. 1962);

United States v. Klinghopper, 285 F.2d 487

(2nd Cir. 1960).

B. THERE WAS NO DENIAL OF DUE
PROCESS IN THE IDENTIFICATION
PROCEDURE.

1. As the Appellant Did Not Move to
Strike the In Court Testimony of
Identification Witnesses, He is
Precluded From Making a Due
Process Attack on the Identification
Procedures.
-

The bank robbery occurred on July 6, 1967 [R. T. 67-68]. Approximately four weeks prior to October 17, 1967, Russell Kerger was shown a group of ten photographs by an Agent of the Federal Bureau of Investigation. The pictures were of ten different male Negroes in their middle twenties. The pictures were shown to Kerger at his office. No suggestion was made as to whether he should pick out any person from the group of pictures. He identified a picture of the appellant [R. T. 79, 86]. He was shown the same group of pictures again on October 16, 1967 [R. T. 81, line 21 to 83, line 5]. That group of pictures is the ten photographs contained in appellee's Exhibit No. 7 and appellant's Exhibit E [R. T. 269, line 22 to 271, line 10]. No suggestion was made concerning who, if any one, he should choose [R. T. 85].

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The following table shows the percentage of the population in each of the four categories of the following table, by year. The first column shows the year, the second column shows the percentage of the population in the first category, the third column shows the percentage of the population in the second category, the fourth column shows the percentage of the population in the third category, and the fifth column shows the percentage of the population in the fourth category.

Year	Category 1	Category 2	Category 3	Category 4
1960	20	80	0	0
1965	30	70	0	0
1970	50	50	0	0
1975	70	30	0	0
1980	80	20	0	0

The following table shows the percentage of the population in each of the four categories of the following table, by year. The first column shows the year, the second column shows the percentage of the population in the first category, the third column shows the percentage of the population in the second category, the fourth column shows the percentage of the population in the third category, and the fifth column shows the percentage of the population in the fourth category.

Year	Category 1	Category 2	Category 3	Category 4
1960	20	80	0	0
1965	30	70	0	0
1970	50	50	0	0
1975	70	30	0	0
1980	80	20	0	0

On July 20, 1967 Laura Thomas was shown a spread of seven photographs. The photographs were of seven different male Negroes. They are contained in appellee's Exhibit numbers 6 and 9 [R. T. 271, line 17 to 272, line 4]. The pictures were shown by an Agent of the Federal Bureau of Investigation. He gave no indication that there were pictures of the bank robbers in the spread [R. T. 113, line 2 to 114, line 10; 138]. She picked out two people as the bank robbers [R. T. 113]. On October 16, 1967 Thomas was shown a different group of ten photographs [R. T. 138]. That group contained pictures of ten different male Negroes and is contained in appellee's Exhibit No. 7 and appellant's Exhibit E. The pictures were shown by an Agent of the Federal Bureau of Investigation who made no suggestion as to who she should pick out [R. T. 138].

Richard Bombard was also shown a group of pictures by an Agent of the Federal Bureau of Investigation. He was shown a group of six or seven photographs of different male Negroes between twenty-two and twenty-eight [R. T. 157-159]. He was shown the pictures out of the presence of other bank witnesses [R. T. 160]. He was not told what pictures to pick out [R. T. 159, lines 16-19; 187]. Bombard was shown the ten pictures contained in appellee's Exhibit 7 and appellant's Exhibit E on October 16, 1967 [R. T. 163, lines 21-23; 165-166; 269-271]. No suggestion was made as to who, if anyone, he should identify [R. T. 187]. Bombard's in-Court identification of appellant was made from his recollection of the robbery and not the photographs [R. T. 183,

line 10 to 184, line 4].

Appellant was aware of the entire identification process during the trial of this case in the District Court. At no time during the proceedings did he move either for a judgment of acquittal or to strike the courtroom identification by the bank employees. The failure to object to this evidence should preclude the consideration of his due process argument on appeal.

United States v. Wade, 388 U.S. 218 (1967);

Toland v. United States, 365 F.2d 304

(9th Cir. 1966);

Bouchard v. United States, 344 F.2d 872, 875

(9th Cir. 1965).

2. The Selection and Showing of Photographs to the Identifying Witnesses Did Not Deprive the Appellant of Due Process.
-

The methods employed by agents of the Federal Bureau of Investigation in showing the pictures are stated in the above argument. Two groups of pictures were shown. They are identified as appellee's Exhibits 6 and 9, seven photographs, and appellee's Exhibit 7 and appellant's Exhibit E, ten photographs. The pictures are of different male Negroes within the same age group. The pictures and procedures comply with the standards set in Simmons v. United States, ___ U.S. ___ (No. 55 Oct. Term, 1967. Decided March 18, 1968). First, it was initially necessary to show the

photographs to identify the robbers. Second, a large number of photographs of different male Negroes were shown in each group. Third, the witnesses were alone when they made their initial identification. and Fourth, there is no evidence that F. B. I. agents suggested who they should pick out.

Finally, each of the witnesses picked appellant out of an in-courtroom line up (See Argument C).

C. AS THE APPELLANT DID NOT MAKE
A MOTION FOR JUDGMENT OF ACQUIT-
TAL AT ANY TIME DURING THE
COURSE OF THE TRIAL, THE QUES-
TION OF THE SUFFICIENCY OF THE
EVIDENCE IS NOT OPEN ON APPEAL.

Before the appellant can ask this Court to review the judgment of the District Court on the grounds of the sufficiency of the evidence, he must preserve this basis by appropriate motion in the trial Court. Rule 29(a) of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

" . . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more defenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."

In the instant case no motion for judgment of acquittal was made either at the close of the Government's case or at the close of all the evidence [R. T. 191, 250, 307].

By failing to interpose his motion in the trial Court appellant has waived his right to appeal on the sufficiency of the evidence.

Hardwick v. United States, 296 F.2d 24

(9th Cir. 1961);

Foster v. United States, 318 F.2d 684

(9th Cir. 1963);

Castro v. United States, 323 F.2d 683 .

(9th Cir. 1963);

Dawkin v. United States, 324 F.2d 521

(9th Cir. 1963).

The Government is not unmindful of Rule 52(b) of the Federal Rules of Criminal Procedure, and such decisions as Bruno v. United States, 259 F.2d 8 (9th Cir. 1958) and Lucas v. United States, 325 F.2d 867 (9th Cir. 1963) wherein the Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a palpable miscarriage of justice, but feels that no injustice would result here. And in any event, the evidence was sufficient to support the verdict. Prior to the impanelment of the jury all witnesses were excluded from the courtroom [R. T. 6-7; 11-12]. The appellant and co-defendant Williams did not sit at counsel table during the testimony of Government witnesses. They sat in the rear of the courtroom with six other male Negroes

[R. T. 59-60]. After the testimony of each of the three tellers a line-up was held in the courtroom [R. T. 72, 96-97, 149]. The line-up consisted of eight male Negroes. Each of the three bank tellers positively identified appellant as the robber who held the pistol in the bank on July 6, 1967 [R. T. 72, line 23 to 73, line 12; 96, line 21 to 97, line 13; 149, lines 3-22]. Only at this time did appellant move to counsel table [R. T. 150].

Viewing this evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the Government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F.2d 825
(9th Cir. 1964);

Mosco v. United States, 301 F.2d 180
(9th Cir. 1962).

CONCLUSION

For the reasons set forth hereinabove, the Judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning

ROGER A. BROWNING

